No. 35230-7-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON WILLIAM CATE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Judge Christopher Culp

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

After a reported break-in to a convenience store in Okanogan, where damage occurred and property was taken, Brandon W. Cate was identified as a potential suspect. According to a law enforcement officer, Mr. Cate admitted involvement. The State charged Mr. Cate with second degree burglary, second degree malicious mischief, and second degree theft.

At the jury trial held on the charges, without any objection by defense counsel, a law enforcement officer testified to statements made by the convenience store owner and a convenience store clerk regarding the cost to repair the damage and the value of the property taken. The convenience store owner did not testify at trial. Mr. Cate was convicted as charged.

Mr. Cate now appeals, arguing there was insufficient evidence to convict him of second degree malicious mischief and second degree theft, or, in the alternative, that he is entitled to a new trial on these two charges because of defense counsel's failure to object to inadmissible hearsay. Mr. Cate also challenges the imposition of a sentence consecutive to another matter on which he was sentenced on the same day as this case.

Mr. Cate also preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Cate guilty of second degree malicious mischief, where the evidence was insufficient that he caused physical damage to the property of another, the "combined value of a door and display case," in an amount exceeding $750.

2. The trial court erred in finding Mr. Cate guilty of second degree theft, where the evidence was insufficient that the property he obtained exceeded $750 in value.

3. Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley regarding the amount of physical damage to the door and display case, as inadmissible hearsay.

4. Testimony given by Sergeant Hawley regarding the amount of physical damage to the door and display case violated the confrontation clause.

5. Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley regarding the value of the property obtained by Mr. Cate, as inadmissible hearsay.

6. The trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8, where Mr. Cate was sentenced on both matters on the same day.

7. An award of costs on appeal against Mr. Cate would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Cate guilty of second degree malicious mischief and second degree theft, where the evidence was insufficient.

a. Whether the trial court erred in finding Mr. Cate guilty of second degree malicious mischief, where the evidence was insufficient that he caused physical damage to the property of another, the "combined value of a door and display case," in an amount exceeding $750.

b. Whether the trial court erred in finding Mr. Cate guilty of second degree theft, where the evidence was insufficient that the property he obtained exceeded $750 in value.

Issue 2: In the alternative, whether Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley as inadmissible hearsay.

Issue 3: Whether the trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8, where Mr. Cate was sentenced on both matters on the same day.

Issue 4: Whether this Court should deny costs against Mr. Cate on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On December 10, 2016, Sergeant Tony Hawley of the Okanogan County Sheriff's Office was dispatched to the Flying B convenience store, located in Okanogan, in response to a report of a burglary. (RP 168-170; 175-176; Pl.'s Ex. 4). Upon his arrival, Sergeant Hawley observed that one of the glass entry doors was broken out. (RP 170, 175-176; Pl.'s Ex. 5). Sergeant Hawley entered the store, and observed a display case with a broken glass door. (RP 173, 177; Pl.'s Exs. 6, 7, 8, 9, 10, 11). He noticed the display case had some items left inside, but there were also empty shelves. (RP 173).

A store clerk, Geetinder Kaur, informed Sergeant Hawley that items were missing from the store, and told him the value of the missing items. (RP 170-171, 187, 189-195).

Two witnesses identified Brandon William Cate as a potential suspect in this incident. (RP 198-201, 207-217, 223-238). Subsequently, Mr. Cate was arrested and questioned by law enforcement officers. (RP 205-206, 238-247). According to Officer Brian Bowling of the Omak Police Department, Mr. Cate told him the following about the Flying B incident:

> He told me that he was responsible for it, that he'd broke the glass to the - - door, and then - - broke the glass case inside with the hammer, and then took some cash, some glass pipes, some baggies, and scales, and some e-cigarettes.

(RP 241).

The State charged Mr. Cate with one count of second degree burglary, one count of second degree malicious mischief, and one count of second degree theft. (CP 163-164). The second degree theft count was charged as follows:

> On or about December 10th 2016, in the County of Okanogan, State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over property, other than a firearm, as defined in RCW 9.41.010, or services of another, to-wit: smoking devices, scales, plastic baggies and E-cigarettes of a combined of a value [sic] exceeding $750 but less than $5000, with the intent to deprive such other of such property or services . . . .

(CP 164).

After Mr. Cate completed an indigency screening form, the trial court determined he was eligible for a public defender at no expense. (CP 171-172).

The case proceeded to a jury trial. (RP 161-305). At the jury trial, witnesses testified consisted with the facts stated above. (RP 168-249). Gangadeep Baines, the owner of the Flying B, did not testify. (RP 168-249).

Sergeant Hawley testified he spoke with the Mr. Baines. (RP 171). Sergeant Hawley testified "Mr. Baines estimated that the damage would be about $1,000 to repair the door, the display cabinet door broken he estimated about $200 - - damage." (RP 172). Defense counsel did not object to this testimony. (RP 172).

Sergeant Hawley testified as follows regarding the $1,000 estimate to repair the door:

> [Defense counsel:] Okay. Regarding the estimate that was provided to you as to the - - $1,000, was a basis provided upon which that estimate was obtained?
> [Sergeant Hawley:] It was a verbal estimate from Mr. Baines. I was not provided any documentation from a company that was going to replace that or anything if that's what you're asking me.
> [Defense counsel:] Oh, okay.
> [Sergeant Hawley:] It was his estimate right there at the time.
> [Defense counsel:] Okay. Do we know how he obtained that number?
> [Sergeant Hawley:] I do not. I asked him (inaudible) written and I - - have not received that.
> [Defense counsel:] Okay.

(RP 184).

Sergeant Hawley testified Ms. Kaur provided him with the sale prices for the items missing from the store. (RP 173-174). He testified the total amount for the items missing was $657, as stated by Ms. Kaur. (RP 174-175). Sergeant

Hawley testified this $657 amount did not include $100 cash. (RP 175). Defense counsel did not object to this testimony. (RP 173-175).

Sergeant Hawley testified Ms. Kaur told him the following items were take from the store:

> A box of small plastic baggies, about one inch by one inch baggies, six small glass pipes, six larger glass pipes, 15 e-cigarettes, three scales, and a self-standing glass - - or four self-standing glass smoking devices.

(RP 183).

He testified Ms. Kaur did not state that any other items were missing from the store. (RP 183). Sergeant Hawley testified as follows regarding cash allegedly taken from the store:

> [Defense counsel:] And did [Ms.] Kaur state that cash was taken?
> [Sergeant Hawley:] I don't recall.
> [Defense counsel:] Okay. If [Ms.] Kaur had stated to you that cash was missing would you have placed that into your report?
> [Sergeant Hawley:] I believe that I would have, yes.
> [Defense counsel:] Okay. Do you see any such statement in your report?
> [Sergeant Hawley:] I do not.

(RP 183-184).

Ms. Kaur testified she figured out what exactly was taken from the store, and that she knows the prices of these items. (RP 189). She testified the following items were missing: a small plastic baggie that costs about $20; six small glass pipes that cost about $7 each; six larger pipes that cost $90; three or four scales; and larger pipes or bongs. (RP 190-193).

Ms. Kaur also testified that told the officer that 15 e-cigarettes were missing. (RP 190). She later testified that maybe five or six e-cigarettes were taken. (RP 192). She testified that e-cigarettes cost $19.99. (RP 192).

Officer Bowling testified Mr. Cate said he might have taken $100 from the store. (RP 242).

The trial court instructed the jury that in order to find Mr. Cate guilty of second degree malicious mischief, it had to find the following elements were proved beyond a reasonable doubt:

> (1) That on or about December 10th 2016, the defendant caused physical damage to the property of another to wit: combined value of a door and display case, in an amount exceeding $750;
> (2) That the defendant acted knowingly and maliciously; and
> (3) That this act occurred in the State of Washington.

(CP 78; RP 264-265).

The trial court instructed the jury that in order to find Mr. Cate guilty of second degree theft, it had to find the following elements were proved beyond a reasonable doubt:

> (1) That on or about December 10th 2016, the defendant wrongfully obtained or exerted unauthorized control over property of another;
> (2) That the property exceeded $750 in value;
> (3) That the defendant intended to deprive the other person of the property; and
> (4) That this act occurred in the State of Washington.

(CP 82; RP 266).

The jury was also instructed on the lesser-included offenses of third degree malicious mischief and third degree theft. (CP 59, 88-93; RP 267-270).

The jury found Mr. Cate guilty as charged. (CP 21-31, 60; RP 301-302).

At sentencing, the trial court sentenced Mr. Cate on two matters, this case and Okanogan County Superior Court No. 17-1-00040-8. (RP 309-331). In this case, the State requested the trial court impose a term of confinement to run consecutively with Okanogan County Superior Court No. 17-1-00040-8. (CP 19, 32-41; RP 311-317). In its sentencing briefs, the State argued the trial court could impose a consecutive sentence pursuant to RCW 9.94A.589(3). (CP 35-36, 40-41).

Mr. Cate requested the trial court impose a term of confinement to run concurrently with the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8. (CP 19; RP 313, 317-318).

The trial court stated it had discretion to impose either concurrent or consecutive sentences. (RP 321-322). The trial court imposed a term of confinement, and ordered this term to run consecutively with the sentence imposed in in Okanogan County Superior Court No. 17-1-00040-8. (CP 25; RP 321-322, 326-328).

Also at sentencing, the trial court asked Mr. Cate what he normally does for an income. (RP 322-323). Mr. Cate told the trial court he used to fish, but it has been about two or three years since he was employed. (RP 323). He told the

trial court he normally gets money from the tribe and the federal government, consisting of payments he receives from a lawsuit. (RP 323). Mr. Cate told the trial court he was not injured or disabled. (RP 323). Following this colloquy, the trial court found Mr. Cate "currently indigent, with pretty much no ability to make payments." (RP 324).

The trial court imposed the following legal financial obligations: $500 victim assessment; $200 criminal filing fee; and $100 DNA collection fee. (CP 26-27; RP 324).

The Judgment and Sentence contains the following boilerplate language:

> **2.5 Legal Financial Obligations/Restitution:** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 24).

The Judgment and Sentence also contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 28).

Mr. Cate timely appealed. (CP 5-16). The trial court entered an Order of Indigency, granting Mr. Cate a right to review at public expense. (CP 1-4).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Cate guilty of second degree malicious mischief and second degree theft, where the evidence was insufficient.

There was insufficient evidence to support Mr. Cate's conviction of second degree malicious mischief, because the evidence presented at trial did not establish that Mr. Cate caused physical damage to the door and display case, in an amount exceeding $750. In addition, there was insufficient evidence to support Mr. Cate's conviction of second degree theft, because the evidence presented at trial did not establish that the property obtained by Mr. Cate exceeded $750 in value. Each of these arguments is addressed in turn below.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v.*

Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*.

a. Whether the trial court erred in finding Mr. Cate guilty of second degree malicious mischief, where the evidence was insufficient that he caused physical damage to the property of another, the "combined value of a door and display case," in an amount exceeding $750.

In order to find Mr. Cate guilty of second degree malicious mischief, the jury had to find that Mr. Cate caused physical damage to the door and display case, in an amount exceeding $750. Physical damage includes the cost to repair any physical damage. The only evidence of physical damage presented at trial was hearsay testimony of undocumented and unsupported repair costs. Based on this evidence, a rational jury could not have found Mr. Cate guilty of second degree malicious mischief beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Cate's conviction of second degree malicious mischief.

To find Mr. Cate guilty of second degree malicious mischief, the jury had to find that he "caused physical damage to the property of another to wit: combined value of a door and display case, in an amount exceeding $750[.]" CP 78; RP 264-265; *see also* RCW 9A.48.080(1)(a) (second degree malicious mischief). For the purposes of second degree malicious mischief, "[p]hysical damage, in addition to its ordinary meaning. . . includes any diminution in the value of any property as the consequence of an act and *the cost to repair any physical damage*[.]" RCW 9A.48.100(1) (emphasis added).

Here, the only testimony regarding the amount of physical damage to the door and display case was from Sergeant Hawley. (RP 171-172, 184). Sergeant Hawley testified that the owner of the Flying B, Mr. Baines, who did not testify at trial, "estimated that the damage would be about $1,000 to repair the door, the display cabinet door broken he estimated about $200 - - damage." (RP 172). Sergeant Hawley testified this was a verbal repair estimate given to him by Mr. Baines, without any documentation from a repair company. (RP 184). Sergeant Hawley testified he does not know how Mr. Baines obtained these repair numbers. (RP 184).

Sergeant Hawley's testimony regarding the amount of physical damage to the door and display case was not based upon his personal

knowledge, but upon a verbal, undocumented, and unsupported estimate from Mr. Baines. (RP 171-172, 184). This testimony was inadmissible hearsay. *See* ER 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *see also* ER 802 ("Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."). Mr. Baines did not testify, nor was any documentation provided to support Sergeant Hawley's testimony. As a result, the information provided by Sergeant Hawley could not be cross-examined.

Because Sergeant Hawley's testimony regarding the amount of physical damage to the door and display case was inadmissible hearsay, the State failed to provide evidence that Mr. Cate caused physical damage the door and display case, in an amount exceeding $750.

In addition, the State also failed to provide evidence that Mr. Cate caused physical damage to the door and display case, in an amount exceeding $750, because there was no testimony presented regarding the basis of Mr. Baines' estimated repair costs. *See State v. Williams*, 199 Wn. App. 99, 105-11, 398 P.3d 1150 (2017).

In *Williams*, the defendant argued the State presented insufficient evidence to convict him of second degree possession of stolen property. *Id*. at 104. In order to convict him of this crime, the State had to prove the

value of the stolen property the defendant possessed exceeded $750 in value. *Id*. at 105. "Value" was defined as "the market value of the property or services at the time and in the approximate area of the criminal act." *Id*. The evidence of value presented at trial consisted of a witness testifying that the value of the stolen property was "roughly $800." *Id*.

This Court held there was insufficient evidence to support the defendant's conviction. *Id*. at 105-11. The Court reasoned the witness was asked "to testify to a 'value' of the property, not to a 'market value' or 'fair market value' of the property." *Id*. at 111. The Court further reasoned that the witness "did not testify to the basis of his opinion of value[,]" and that "[f]or all we know, he used the purchase price of the goods, the replacement cost of the goods, or some intrinsic value to himself." *Id*.

Here, like in *Williams*, there was no testimony presented regarding the basis of Mr. Baines' estimated repair costs. *See Williams*, 199 Wn. App. at 111. There was no way for the jury to determine the basis for Mr. Baines' repair estimates of "about $1,000" for the door and "about $200" for the display case. (RP 172). Without documentation from a repair company, or any basis whatsoever for these amounts, there was insufficient evidence for the jury to find, beyond a reasonable doubt, that Mr. Cate caused physical damage in an amount exceeding $750.

Based on the foregoing, a rational jury could not have found Mr. Cate guilty of second degree malicious mischief beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *see also* CP 78; RP 264-265; RCW 9A.48.080(1)(a). His conviction for second degree malicious mischief should be reversed, and because the jury was instructed on the lesser-included offense of third degree malicious mischief, remanded for the entry of a judgment and sentence for third degree malicious mischief. *See In re the Pers. Restraint of Heidari*, 174 Wn.2d 288, 292–93, 274 P.3d 366 (2012) (remand for resentencing on a lesser included offense is appropriate only if the jury was explicitly instructed on the lesser offense); *see also* CP 59, 88-90; RP 267-269.

b. Whether the trial court erred in finding Mr. Cate guilty of second degree theft, where the evidence was insufficient that the property he obtained exceeded $750 in value.

In order to find Mr. Cate guilty of second degree theft, the jury had to find that the property he obtained exceeded $750 in value. The evidence presented at trial did not establish that the property obtained exceeded this required amount. A rational jury could not have found Mr. Cate guilty of second degree theft beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Cate's conviction of second degree theft.

To find Mr. Cate guilty of second degree theft, the jury had to find that he "wrongfully obtained or exerted unauthorized control over property of another . . . [t]hat . . . exceeded $750 in value[.]" (CP 82; RP 266); *see also* RCW 9A.56.040(1)(a) (second degree theft).

For the purposes of second degree theft, "value" is defined as "the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(21)(a). "Market value" means "the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction." *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (internal quotation marks omitted) (citations omitted). "Evidence of retail price *alone* may be sufficient to establish value." *Id.* at 430.

Here, Sergeant Hawley testified Ms. Kaur provided him with the sale prices for the items missing from the store, and that the total amount for the items missing was $657. (RP 173-175). Sergeant Hawley listed the items Ms. Kaur stated were missing from the store, and this list did not include cash. (RP 183). He testified that his report did not contain any statements from Mr. Kaur that cash was missing from the store. (RP 183-184).

Officer Bowling testified Mr. Cate told him he took some cash from the store, and that he might have taken $100. (RP 241-242).

Ms. Kaur testified the following items were missing from the store: a small plastic baggie that costs about $20; six small glass pipes that cost about $7 each; six larger pipes that cost $90; three or four scales; and larger pipes or bongs. (RP 190-193). Ms. Kaur also testified that told the officer that 15 e-cigarettes were missing. (RP 190). She later testified that maybe five or six e-cigarettes were taken. (RP 192). She testified that e-cigarettes cost $19.99. (RP 192).

Considering the above evidence presented at trial, the evidence was insufficient that the property Mr. Cate obtained exceeded $750 in value.

First, the State alleged in the charging document that Mr. Cate obtained the following property, with a combined value exceeding $750: smoking devices, scales, plastic baggies and E-cigarettes. (CP 164). The State did not allege that Mr. Cate obtained cash. (CP 164). Therefore, it was improper to ask the jury to consider evidence that cash was obtained, as proof of the second degree theft count, where it did not charge cash in the charging document. *See State v. Peterson,* 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (stating "a defendant has the right to be informed of charges against him and to be tried only for offenses charged."). When the cash allegedly obtained is not considered, at most, the evidence only shows that Mr. Cate obtained $657 in property from the Flying B, which

does not exceed $750 in value, as required to support a conviction for second degree theft. (CP 82; RP 173-175, 266); *see also* RCW 9A.56.040(1)(a).

Second, in the alternative, it is improper to consider the $100 cash allegedly taken from the Flying B, because corpus delicti is not established for this evidence. "Essentially, corpus delicti is a corroboration rule that 'prevent[s] defendants from being unjustly convicted based on confessions alone.'" *State v. Cardenas-Flores*, No. 93385-5, 2017 WL 3527499, at *3 (Wash. Aug. 17, 2017) (quoting *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010)). In order to establish corpus delicti, "[t]he State must present other independent evidence ... that the crime a defendant *described in the* [*confession*] actually occurred." *Cardenas-Flores*, 2017 WL 3527499, at *3 (alterations in original) (quoting *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006)). Corpus delicti pertains to sufficiency of the evidence, and can be raised for the first time on appeal. *Cardenas-Flores*, 2017 WL 3527499, at *9.

Here, the only evidence that $100 cash was taken came from Mr. Cate's confession to Officer Bowling. (RP 241-242). Neither Officer Hawley nor Ms. Kaur testified that any cash was taken. (RP 173-175, 183-184, 189-193). The State did not present evidence, independent of Mr. Cate's confession, that $100 cash was taken from the Flying B.

Therefore, corpus delicti was not established for the $100 cash, and it should not be considered as proof that the property Mr. Cate obtained exceeded $750 in value. As recognized above, when the cash allegedly obtained is not considered, at most, the evidence only shows that Mr. Cate obtained $657 in property from the Flying B.

Finally, should this Court reject the arguments above and find that jury could consider the evidence that Mr. Cate obtained $100 in cash from the Flying B, there was still insufficient evidence that the property Mr. Cate obtained from the Flying B exceeded $750 in value.

Sergeant Hawley's testimony regarding the total amount for the items missing from the store was based upon what Ms. Kaur told him. (RP 173-175, 183-184). This testimony was inadmissible hearsay. *See* ER 801(c); *see also* ER 802. Further, although Ms. Kaur did testify, she testified to a different value for the items missing from the store than Sergeant Hawley. (RP 173-175, 190-193). Sergeant Hawley testified the total amount for the items missing was $657. (RP 173-175). Ms. Kaur's testimony was that the value of the items missing from the store totaled, at most, $451.85.[1] (RP 190-193). Even if $100 cash is added to this amount,

[1] This amount is reached by adding together the amounts testified to by Ms. Kaur: $20 (small plastic baggie) + $42 ($7 x 6 small glass pipes) + $90 (six larger pipes) + $299.86 ($19.99 x 15 e-cigarettes) = $451.86. (RP 190-193).

the value of the items obtained from the Flying B does not exceed $750, as required to support a conviction for second degree theft.

Based on the foregoing, a rational jury could not have found Mr. Cate guilty of second degree theft beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *see also* CP 82; RP 266; RCW 9A.56.040(1)(a).

His conviction for second degree theft should be reversed, and because the jury was instructed on the lesser-included offense of third degree theft, remanded for the entry of a judgment and sentence for third degree theft. *See In re Heidari*, 174 Wn.2d at 292–93 (remand for resentencing on a lesser included offense is appropriate only if the jury was explicitly instructed on the lesser offense); *see also* CP 59, 91-93; RP 269-270.

Issue 2: In the alternative, whether Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley as inadmissible hearsay.

Mr. Cate requests this Court consider this argument, made in the alternative, if it rejects his sufficiency of the evidence arguments presented in Issue 1 above. At trial, Sergeant Hawley testified to out-of-court statements made to him by Mr. Baines regarding the amount of physical damage to the door and display case, and by Ms. Kaur regarding the value of the property obtained by Mr. Cate from the Flying B. Defense

counsel's failure to object to the admission of this evidence from Sergeant Hawley constituted ineffective assistance of counsel, because an objection based on hearsay would have been sustained, the result of the trial would have been different if this evidence had not been admitted, and the decision not to object was not tactical. Therefore, Mr. Cate's convictions for second degree malicious mischief and second degree theft should be reversed and remanded for a new trial.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). "[S]trategy must be based on reasoned decision-

making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, defense counsel's failure to object to the admission of two different types of evidence testified to by Sergeant Hawley constituted ineffective assistance of counsel. Each type of evidence is addressed below.

First, Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley regarding the amount of physical damage to the door and display case, as inadmissible hearsay. Sergeant Hawley testified "Mr. Baines estimated that the damage would be about $1,000 to repair the door, the display cabinet door broken he estimated about $200 - - damage." (RP 172).

Defense counsel's failure to object to the admission of Sergeant Hawley's testimony regarding the amount of physical damage to the door and display case fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the admission of this testimony as inadmissible hearsay would have been sustained. *See* ER 801(c); ER 802. Sergeant Hawley's testimony was an out-of-court statement offered to prove the truth of the matter asserted, and no hearsay exception applies that would make it admissible. *See* RP 172; *see also* ER 801(c); ER 802.

Further, admitting Sergeant Hawley's testimony to out-of-court statements made to him by Mr. Baines regarding the amount of physical damage to the door and display case violated the confrontation clause. *See State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007). "The confrontation clause prohibits the admission of testimonial hearsay unless the defendant has an opportunity to cross-examine the declarant." *Id*. at 833 (citing *State v. Shafer*, 156 Wn.2d 381, 388, 128 P.3d 87 (2006)); *see also Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "A statement is testimonial if a reasonable person in the declarant's position would anticipate that his statement would be used against the accused in investigating or prosecuting a crime." *Id*. (citing *Shafer*, 156 Wn.2d at 389).

Here, Sergeant Hawley was conducting a criminal investigation when he spoke with Mr. Baines, so the hearsay was testimonial. Mr. Cate did not have the opportunity to cross-examine Mr. Baines, because Mr. Baines did not testify at trial. (RP 168-249). Therefore, Sergeant Hawley's testimony to out-of-court statements made to him by Mr. Baines regarding the amount of physical damage to the door and display case violated the confrontation clause and is barred under *Crawford*. *See Hendrickson*, 138 Wn. App. at 833; *see also Crawford*, 541 U.S. at 68.

Defense counsel's failure to object was not tactical. This was the only testimony regarding the amount of physical damage to the door and display case. (RP 171-172). Without this testimony, the State could not establish an essential element of the crime of second degree malicious mischief, physical damage in an amount exceeding $750. *See* CP 78; RP 264-265; *see also* RCW 9A.48.080(1)(a).

Had defense counsel objected to the admission of Sergeant Hawley's testimony regarding the amount of physical damage to the door and display case, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. Without this testimony necessary to establish a damage amount exceeding $750, the State would not have been able to prove the elements of second degree malicious mischief, but only the lesser-included offense of third degree malicious mischief. *See* RCW 9A.48.090(1)(a) (defining third degree malicious mischief).

Second, Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley regarding the value of the property obtained by Mr. Cate, as inadmissible hearsay. Sergeant Hawley testified Ms. Kaur provided him with the sale prices for the items missing from the store, and that the total amount for the items missing was $657. (RP 173-175).

Defense counsel's failure to object to the admission of Sergeant Hawley's testimony above from Ms. Kaur regarding the value of the property obtained by Mr. Cate fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the admission of this testimony as inadmissible hearsay would have been sustained. *See* ER 801(c); ER 802. Sergeant Hawley's testimony was an out-of-court statement offered to prove the truth of the matter asserted, and no hearsay exception applies that would make it admissible. *See* RP 173-175; *see also* ER 801(c); ER 802.

Defense counsel's failure to object was not tactical. This testimony was necessary to establish an essential element of the crime of second degree theft, obtaining property which exceeds $750 in value. *See* CP 82; RP 266; *see also* RCW 9A.56.040(1)(a). Without this testimony, the State would have to rely on Ms. Kaur's testimony as to value, which does not exceed $750. (RP 190-193).

Had defense counsel objected to the admission of Sergeant Hawley's testimony regarding the value of the property obtained by Mr. Cate, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. Without this testimony necessary to establish that the value of property obtained by Mr. Cate from the Flying B exceeded $750, the State would not have been able to prove the elements of second degree

theft, but only the lesser-included offense of third degree theft. *See* RCW 9A.56.050(1) (defining third degree theft). The State would have to rely on Ms. Kaur's testimony as to value, which, at most, totaled $451.85.[2] (RP 190-193). Even if $100 cash is added to this amount, the value of the items obtained from the Flying B does not exceed $750, as required to support a conviction for second degree theft.

Mr. Cate has proven that defense counsel's failure to object to the admission of Sergeant Hawley's testimony regarding the amount of physical damage to the door and display case and the value of the property obtained by Mr. Cate from the Flying B constituted ineffective assistance of counsel. *See Sexsmith*, 138 Wn. App. at 509; *see also* RP 172-175. His convictions for second degree malicious mischief and second degree theft should be reversed and remanded for a new trial.

Issue 3: Whether the trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8, where Mr. Cate was sentenced on both matters on the same day.

The trial court imposed a sentence in this case to run consecutive to the sentence in a separate case that was sentenced on the same day as this matter. Because the Sentencing Reform Act (SRA) does not authorize

[2] This amount is reached by adding together the amounts testified to by Ms. Kaur: $20 (small plastic baggie) + $42 ($7 x 6 small glass pipes) + $90 (six larger pipes) + $299.86 ($19.99 x 15 e-cigarettes) = $451.86. (RP 190-193).

the imposition of consecutive sentences under these facts, the trial court erred in imposing consecutive sentences and the case should be reversed and remanded for resentencing.

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'"). "The interpretation of provisions of the SRA involves questions of law that we review de novo." *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

Subject to some exceptions, under the SRA, sentences for two or more current offenses "shall be served concurrently[,]" and "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a); *see also State v. Smith*, 74 Wn. App. 844, 853–54, 875 P.2d 1249 (1994) (holding that "defendants who are sentenced for multiple convictions at the same proceeding must be given concurrent sentences unless the sentencing court determines that there are grounds for an exceptional sentence.").

"While the SRA does not formally define 'current offense,' the term is defined functionally as convictions entered or sentenced on the

same day." *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013); *see also* RCW 9.94A.525(1) (stating "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589.").

Here, the trial court sentenced Mr. Cate on two matters on the same day, this case and Okanogan County Superior Court No. 17-1-00040-8. (CP 21-31, 60; RP 301-302). The trial court imposed a term of confinement in this case, and ordered this term to run consecutively with the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8. (CP 25; RP 321-322, 326-328).

The trial court erred in imposing a sentence in this case consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8. Because the two cases were sentenced on the same day, the convictions in each case are "current offenses." *See Finstad*, 177 Wn.2d at 507. Therefore, RCW 9.94A.589(1)(a) requires Mr. Cate's sentences in the two cases to be served concurrently. *See State v. Miller*, No. 48548-6-II, 2017 WL 888610, at *2-3 (Wash. Ct. App. Feb. 28, 2017) (holding that the sentences in two separate cases sentenced on the same day must be served concurrently); *State v. Barclay*, Nos. 30475-2-III, 30477-9-III, 2013 WL 1694879, at *3 (Wash. Ct. App. April 18, 2013)

(holding that the trial court erred in imposing consecutive sentences for two cases sentenced on the same day).[3]

In addition, consecutive sentences could not be imposed under the exceptional sentence provisions of RCW 9.94A.535, because the trial court did not follow the procedure for imposing an exceptional sentence. *See* RCW 9.94A.535; RCW 9.94A.589(1)(a); *see also Barclay*, 2013 WL 1694879, at *3 ("The trial court could not have imposed consecutive sentences under these facts without declaring an exceptional sentence.").[4] Specifically, an exceptional sentence may be imposed, under RCW 9.94A.535, if "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. If such a sentence is imposed, "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Likewise, consecutive sentences were not authorized under RCW 9.94A.589(3). This statutory provision provides:

> *Subject to subsections (1) and (2) of this section*, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or

[3] "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1. These cases are cited as persuasive authority only.

[4] *See* fn. 3 above.

> another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders that they be served consecutively*.

RCW 9.94A.589(3) (emphasis added).

Because RCW 9.94A.589(3) expressly states that it is subject to RCW 9.94A.589(1), RCW 9.94A.589(1) controls and requires Mr. Cate's two sentences to be run concurrently, unless the trial court followed the procedures for an exceptional sentence. *See Smith*, 74 Wn. App. at 852 n.5; *see also*[5] *Miller*, 2017 WL 888610, at *3 (concluding that RCW 9.94A.589(1) controls over RCW 9.94A.589(3) for two separate cases sentenced on the same day); *Barclay*, 2013 WL 1694879, at *3 n.5 (noting that RCW 9.94A.589(3) is not applicable to offenses sentenced on the same day).

Therefore, because two cases sentenced on the same day are current offenses, the trial court erred in imposing a sentence here consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8, and the case should be reversed and remanded for resentencing.

[5] *See* fn. 3 above.

Issue 4: Whether this Court should deny costs against Mr. Cate on appeal in the event the State is the substantially prevailing party.

Mr. Cate preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Cate indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 1-4, 171-172; RP 322-324). To the contrary, Mr. Cate's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Cate remains indigent. The report shows that Mr. Cate's financial circumstances have not improved since the date he was sentenced in this case.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of

judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial

discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Cate has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Cate would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State's collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis."

GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Cate met this standard for indigency. (CP 1-4, 171-172; RP 322-324).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 1-4. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Cate to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Cate's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Cate remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the "supreme court . . . <u>may</u> require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991

P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Cate's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Cate remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Cate guilty of second degree malicious mischief and second degree theft. His convictions should be reversed and remanded for the entry of judgment

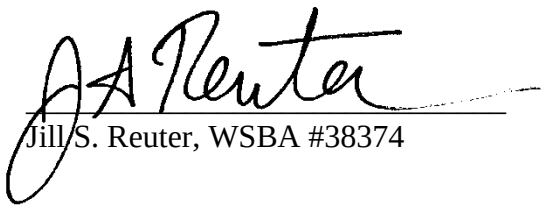
and sentences for the lesser included offenses of third degree malicious mischief and third degree theft.

In the alternative, Mr. Cate's convictions of second degree malicious mischief and second degree theft should be reversed and remanded for a new trial, because Mr. Cate received ineffective assistance of counsel when defense counsel failed to object to testimony given by Sergeant Hawley as inadmissible hearsay.

At a minimum, the case should be reversed and remanded for resentencing, for the trial court to impose a sentence that is concurrent with, rather than consecutive to, the sentence imposed in Okanogan County Superior Court No. 17-1-00040-8.

Mr. Cate also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 9th day of November, 2017.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

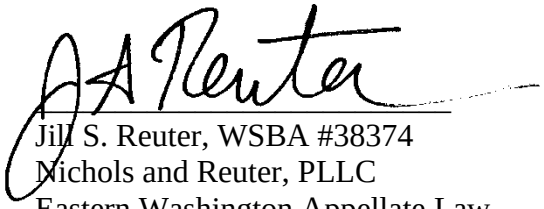
STATE OF WASHINGTON Plaintiff/Respondent vs. BRANDON WILLIAM CATE Defendant/Appellant	)	COA No. 35230-7-III PROOF OF SERVICE

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 9, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Brandon William Cate, DOC #894326
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at ldrangsholt@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 9th day of November, 2017.



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